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OCTOBER TERM, 1961

No. [redacted] 149

SUN OIL COMPANY, *Petitioner,*

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN A. WARD, III
1608 Walnut Street
Philadelphia, Pennsylvania

JOINER CARTWRIGHT
HERF M. WEINERT
P. O. Box 2831
Beaumont, Texas

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.
Attorneys for Petitioner, Sun Oil Company

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Petitioner, Sun Oil Company, an intervenor in the Court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in Cause No. 18112 on February 22, 1961. The judgment set aside an order of the Federal Power Commission issued August 10, 1959, granting Petitioner a certificate of public convenience and necessity.

OPINION BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported and are printed in Appendix A, *infra*, pp. 1a-29a. The order of the Federal Power Commission granting Petitioner a certifi-

cate of public convenience and necessity (R. 252-256) is reported at 22 F.P.C. 351-354 and its order denying rehearing (R. 287-288) is reported at 22 F.P.C. 654-655.[1]

JURISDICTION

The judgment of the Court of Appeals was entered February 22, 1961 (Appendix A, *infra*, p. 30a). Rehearing was denied April 6, 1961 (Appendix A, *infra*, p. 31a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Atlantic Refining Company* v. *Public Service Commission of New York*, 360 U.S. 378 (*"Catco"*) requires, as apparently held by the Court below, that an applicant for a certificate of public convenience and necessity to sell natural gas must show that the proposed initial price is related to a just and reasonable price.

2. Whether this Court's *Catco* decision requires, as apparently held by the Court below, (1) that non-current prices must be considered in determining whether the initial price proposed in a certificate proceeding is "in line" under the criterion of that decision of this Court; and (2) that the Commission in determining whether an initial price proposed in a certificate proceeding is "in line" may not consider prices accepted by it in other matters no longer subject to judicial review, because similar prices in the area are involved in other proceedings still subject to review.

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[1] Record references are to the Joint Appendix filed with the Court of Appeals.

3. Whether this Court's *Cities* decision permits the Court below to set aside an initial certificate without price condition when the decision of that Court is predicated upon that Court's apparent re-evaluation of only a part of the evidence of record.

STATUTES INVOLVED

This case involves Section 7 and Section 19(b) of the Natural Gas Act, as amended (15 U.S.C. § 717f, § 717r (b)), pertinent provisions of which are printed in Appendix B, *infra*, pp. 34a-38a.

STATEMENT OF THE CASE

On May 19, 1958, Petitioner filed with the Federal Power Commission ("Commission") in Docket No. G-15122 an application for a disclaimer of jurisdiction or, in the alternative, an application for a certificate of public convenience and necessity with respect to the sale of natural gas to United Gas Pipe Line Company ("United") from the Belle Isle Field, St. Mary Parish, Louisiana (R. 171-177, 184). On the same date, Petitioner filed with the Commission as its rate schedule applicable to such proposed sale, the gas purchase contract between Petitioner and United dated May 1, 1958 (R. 103-150).

On May 19, 1958, United filed with the Commission in Docket No. G-15123 an application for a certificate of public convenience and necessity authorizing the construction and operation of approximately 9.35 miles of 16-inch lateral supply line and appurtenances to purchase and receive the natural gas from Petitioner pursuant to the contract of May 1, 1958 (R. 17, 19, 183).

By a notice issued on November 26, 1958, the aforementioned applications of Petitioner and United were consolidated for hearing (R. 183-184, 216). The United Gas Improvement Company ("UGI") and the Public Service Commission of the State of New York ("PSC-NY") were permitted to intervene, over the objections of the Petitioner, by an order of the Commission issued January 5, 1959 (R. 186-190, 192, 194-196, 199-201, 212). As provided in the Commission's notice dated November 26, 1958, a hearing was convened on December 30, 1958, but on account of the petition to intervene by UGI and the notice of intervention by PSC-NY, the hearing was recessed to January 27, 1959, on which date a formal hearing was held and concluded (R. 1-2, 6, 216).

On March 3, 1959, the Presiding Examiner issued his decision and order granting the certificates prayed for by Petitioner and United without price condition (R. 215-224). Exceptions to the Presiding Examiner's decision were filed by UGI and PSC-NY directed primarily to the findings of the Presiding Examiner with respect to the initial price (R. 252-263). UGI requested the Commission to withhold a decision until this Honorable Court reached a decision in *Atlantic Refining Company* v. *Public Service Commission of New York*[2] (R. 252). This Court rendered its *Catco* decision on June 22, 1959, and thereafter the Commission on August 10, 1959, after full consideration of this Court's *Catco* opinion, issued an order adopting with modifications the Presiding Examiner's decision granting the certificates sought by Petitioner and United. The certificates issued by the Commission

[2] The Court's decision is reported in 360 U.S. 378.

contained no price condition (R. 252-256). The initial price set forth in the contract of May 1, 1958 is 21.5 cents per Mcf at 15.025 psia with reimbursement of all tax on gas as of the date deliveries commenced amounting to 2.3 cents per Mcf at the time of hearing (R. 121-122, 127-128, 132-133, 218).

In issuing its decision of August 10, 1959, the Commission set forth in summary findings, after referring to more detailed findings in a prior opinion,[3] its "understanding of the requirements" of this Court's *Catco* decision with respect to initial prices of independent producers in certificate cases (R. 253). In this connection, the Commission stated: "Summarizing briefly, under the *Catco* case the producer's proposed initial price must be supported by substantial evidence establishing that the price is required by the public convenience and necessity and is in the public interest; and that although the Commission should consider all the factors, price is an element of prime importance which the Commission should scrutinize closely with a view of protecting the consumer" (R. 253). The Commission reviewed the guides this Court had indicated applicable with respect to the evidence that might be appropriately adduced in connection with the initial price (R. 253-254). The Commission then reviewed the evidence of record in this proceeding to determine whether the showings made by the parties justified the issuance of certificates without price condition. The Commission determined that the parties had made the requisite showing (R. 254-255). Under Section 19(b) of the Natural Gas Act the "* * * finding

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[3] In the Matter of *South Georgia Natural Gas Company, et al.*, Docket Nos. G-9892, *et al.* (Opinion No. 325), 22 F.P.C. 211, 217.

of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

After petitions for rehearing were filed by UGI and PSC-NY, and such petitions were denied by an order issued by the Commisison on October 7, 1959, UGI filed on December 1, 1959, in the United States Court of Appeals for the Fifth Circuit a petition to review the order of August 10, 1959 issuing a certificate of public convenience and necessity without price condition to Petitioner (R. 258-263, 267-284, 287-288). After oral argument, the Court on February 22, 1961 issued its decision in which it concluded and ordered that the Commission's order of August 10, 1959 should be set aside and the proceedings remanded for further appropriate action. On February 22, 1961, the Court also issued its decision and order in Cause No. 18113, regarding a certificate of public convenience and necessity also issued by the Commission on August 10, 1959. Inasmuch as the Court in its opinion in Cause No. 18113 interpreted its opinion in Cause No. 18112, review of which is hereby sought, the opinion in Cause No. 18113 is also printed in Appendix A, *infra*, pp. 32a-33a.

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court Below Is Not in Accord With This Court's Catco Decision

The decision of the Court below, we respectfully submit, is not in accord with the principles enunciated by this Court's *Catco* decision. Particularly, because of intervening circumstances, as discussed in Section B hereof, it is important that this Court make its *Catco* principles definite at this time.

1. The decision of the Court below, as such decision has been interpreted by that Court in its decision in

Cause No. 18113 also issued February 22, 1961, erroneously concludes that this Court's *Cities* decision requires an independent producer to show its proposed initial price of natural gas is related to a just and reasonable price. In its decision, Cause No. 18113, the Court below stated: "As we have pointed out in the companion case No. 18112, the record makes it clear that the finding of public convenience and necessity here is based too strongly on the fact that arm's length dealing and the effect of supply and demand requires Transco[4] to agree to the disputed price, *rather than that the price had any relation to what might ultimately be found to be a just and reasonable price*"[5] (Appendix A, *infra*, pp. 32a-33a).

When the foregoing interpretation in Cause No. 18113 is considered with the statements and comments of the Court in this cause, it seems apparent that the Court below ordered the Commission's order be set aside, because of its view that Petitioner had not shown that its initial price is related to a just and reasonable price. For example, the Court below commented that in its *Bel Oil Corp.* decision it stated that a price resulting from arm's-length bargaining is not necessarily a just and reasonable price[6] (Appendix A, *infra*, p. 5a). The Court below also noted that this Court pointed out in its *Hope* case[7] that the purpose of the Act is to underwrite just and reasonable rates to the consumers of natural gas (Appendix A, *infra*, p.

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[4] "Transco" refers to Transcontinental Gas Pipe Line Co., the purchasing pipeline company in Cause No. 18113 (22 F.P.C. 369).

[5] Emphasis added unless otherwise indicated.

[6] *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548, 553 (1958).

[7] *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

5a). Further, the Court below refers to the differences between the level of intitial prices in certificate proceedings and price suspensions in Section 4 proceedings wherein the independent producer must show the prices to be just and reasonable (Appendix A, *infra*, pp. 5a-7a). Judge Brown in his dissent also notes that "* * * the majority treats the certification problem as though it were a rate hearing" (Appendix A, *infra*, p. 21a).

In contrast, this Court's *Catco* decision clearly points out that the determination of a just and reasonable price is not required in a certificate proceeding:

> "It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates" (360 U.S. at 390-391).

The United States Court of Appeals for the Ninth Circuit also holds that there is no requirement that "the Commission must determine that the proposed initial price is just and reasonable."[8]

The Court of Appeals for the District of Columbia[9] in considering the requirements of this Court's *Catco*

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[8] *The United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 820, cert. denied April 17, 1961 (*California Co.* v. *United Gas Improvement Co.*, ... U.S. .... [No. 776, Oct. Term, 1960], 29 Law Week 3304; *Superior Oil Co.* v. *United Gas Improvement Co.*, . . . U. S. .... [No. 780, Oct. Term, 1960], 29 Law Week 3304).

[9] *Public Service Commission of the State of New York* v. *F.P.C.*, 287 F. 2d 146, 150, cert. denied, April 17, 1961 (*Shell Oil Co.* v. *Public Service Commission of New York*, ... U.S. .... [No. 774, Oct. Term, 1960], 29 Law Week 3304; *Hope Natural Gas Co.* v. *Public Service Commission of New York*, ... U.S. .... [No. 793, Oct. Term, 1960], 29 Law Week 3304).

decision referred to a provision in Section 7(c) prior to its amendment in 1942 as did this Court in its *Catco* decision[10] that it was the intention of Congress that natural gas be sold in interstate commerce for resale for ultimate public consumption, for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest. The Court of Appeals for the District of Columbia Circuit thus does not agree with the holding of the Court of Appeals for the Fifth Circuit in this case that the initial price in a certificate proceeding must be related to the "just and reasonable" standard of Sections 4 and 5 of the Natural Gas Act in determining whether the initial price is required by the public interest.

To require a relationship between what might ultimately be found to be a just and reasonable price is clearly not in accord with this Court's *Catco* decision and the aforementioned decision of the Ninth Circuit. Moreover, the Court below has created an indefinite standard and one that cannot be applied until there is a rate case determination which this Court has stated is not necessary. It is also appropriate to point out that in a subsequent decision[11] the Court below, in affirming a Commission order issuing a certificate with price conditions, appears to have changed its view of the standard required by this Court's *Catco* decision for considering initial prices in certificate proceedings. In the decision in that case the Court stated:

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[10] 360 U.S. at 388.

[11] *Texaco, Inc., et al.* v. *F.P.C.* (CA 5, April 14, 1961), ... F. 2d .... (Nos. 18349, 18354, 18357, 18364, 18366, 18379, 18394, 18398, 18542, 18543).

> "As we have already indicated, and as all parties recognize, a section 7 proceeding is not to be equated with a proceeding under section 4 or section 5 to determine a just and reasonable rate. The power and duty of the Commission to give 'most careful scrutiny and reasonable reaction to initial price proposals of producers' may be discharged by it without the elaborate and detailed proofs required in a section 4 or a section 5 proceeding * * *" (Slip opinion, p. 17).

Clearly the action of the Court below in this proceeding was based on an erroneous interpretation of this Court's *Catco* decision, as that Court's own later decision signifies. Such action of the Court below, based on an erroneous standard, we respectfully submit, should not be permitted to stand. Unless the decision is now corrected, it will, as discussed hereinafter, result in interminable delays in determining the conditions under which independent producers may commit natural gas to the interstate market.[12]

2. The Court below erred in apparently considering non-current area prices in finding Petitioner's price had not been justified contrary to the finding of the Court of Appeals for the Ninth Circuit in another similar proceeding. Additionally, the Court apparently holds that prices finally accepted by the Commission (and not subject to further Commission or Court review) may become suspect and unusable for comparative purposes when like prices for the same area are subject to Court or Commission review.

In *Catco,* this Court set forth the following criteria for determining whether a certificate should be issued with price conditions:

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[12] See pp. 16-20.

> "* * * Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary" (360 U.S. at 391).

The record in this case demonstrates that Petitioner's sale to United would not result in the triggering of general price increases, would not result in an increase in United's existing rates and would only cause a negligible increase of 1/10th of 1 cent per Mcf in the average cost of gas to United.[13] Under such circumstances, consumers are afforded the bond of protection from excessive charges required by the Act (Cf. 360 U.S. at 388).

There appears to be a different view between the Court below and the Court of Appeals for the Ninth Circuit with regard to the prices which should be con-

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[13] The uncontradicted testimony shows that the price, including tax reimbursement, will have no substantial effect on United's weighted price of gas. Such testimony shows that the purchase will increase the average cost to United by only 1/10th of 1 cent per Mcf (R. 34). Unlike the *Cateo* case, there was definite and firm evidence that United had no "favored nation" clauses in its contracts which would be triggered by the Sun-United contract (R. 25). As the Commission had already certificated a price of 22 cents per Mcf plus tax reimbursement (In Re *Trunkline Gas Co., et al.*, 21 F.P.C. 704, which is now final), the Sun-United contract would not trigger any favored nation clauses in other pipeline contracts. The Presiding Examiner found that "There is no showing in this record that, because of the purchase of this Belle Isle Field natural gas at this initial price (21.5 cents per Mcf plus tax), there will be any increase in price to the ultimate consumer—for whose protection the Natural Gas Act was enacted. * * *" (R. 219).

sidered in determining whether the proposed initial price is "in line". While the Court below stated that it would not attempt to determine "what the 'line' is on this record", it also stated "We have no doubt that in this case the price of 23½ cents per Mcf, including tax reimbursement, * * * was out of line as the term was used by the Supreme Court" (Appendix A, *infra*, p. 10a). It appears that the Court below reached the conclusion by comparisons with average prices paid by United in 1954 of 9 cents to 12 cents per Mcf and with the Commission's action in suspending increases under escalation clauses of from 9 to 15 cents per Mcf (Appendix A, *infra*, pp. 6a-7a). As Judge Brown points out, "It [the Court below] concludes that we must go back to 1954 * * *" (Appendix A, *infra*, p. 19a).

The Court of Appeals for the Ninth Circuit set forth that "the price line is intended to reflect current conditions in the industry", and "comparative prices upon which it [the line] is based must be prices under which a substantial amount of natural gas presently moves in interstate commerce".[14] It would appear by definition that any average of all prices paid under all contracts regardless of date of contract could not properly be compared with the narrower band of recent transactions determinative of the "line".

Petitioner believes the evidence of record as summarized below[15] supports the Commission's finding that

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[14] *The United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, 824, cert. denied April 17, 1961.

[15] As early as about 1954 certificates were issued for the Gulf Interstate and American Louisiana pipelines and the price for gas paid by these pipelines was 20 cents per Mcf (R. 32). The Commission found that much South Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement (R. 254). There was

Petitioner's base price is in line, and the slightly higher tax reimbursement which the Court below apparently considered as a part of the overall price, is in the public interest when all the factors of record listed in the next section are evaluated (Appendix A, *infra*, p. 10a, fn. 1). Petitioner respectfully submits that price comparisons reflecting "current conditions" are proper rather than comparisons based upon past conditions apparently used by the Court below in holding the price to be "out of line."

In finding that Petitioner's price was out of line, the Court appears to hold that when a substantial number of certificated prices are under Court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect, and should not be relied on in fixing a "line" (Appendix A, *infra*, p. 9a). In essence, this holding requires that only Court-approved prices can be considered in determining the price line when comparable prices are under attack in the same area without any regard to the evidence of record as to the "going" price.

An initial price finally determined by the Commission in a certificate proceeding under Section 7 of the

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uncontradicted evidence in the record that two pipeline companies in the area were paying the base price of 21.5 cents per Mcf (R. 28). The Commission reports show that in its *Southern Natural Gas Co.* decision of April 18, 1958, 19 F.P.C. 558, a price of 22.8 cents per Mcf was approved, and in the *Trunkline Gas Co.* decision of May 22, 1959, 21 F.P.C. 704, a base price of 22 cents plus tax reimbursement was approved. The orders issuing the certificates without price conditions in the *Southern Natural* and the *Trunkline* cases were final, although there was a review of the *Trunkline* case (*Public Service Commission* v. *F.P.C.*, ... F. 2d .... (CADC, No. 15365, decided April 28, 1960)).

Act to be in the public interest remains valid and effective regardless of the action of the Commission on any other initial price proposals in any other Section 7 proceedings and regardless of whether the actions in the later proceedings are reviewed by the Courts. To exclude any finally Commission-accepted prices from the Commission's consideration of initial prices in a certificate case would prevent the Commission from considering current conditions. Moreover, such exclusion would limit the Commission's function "* * * to appraise the facts * * *", bearing upon the public convenience and necessity and to bring to bear upon the problem its expert judgment (Cf. *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241). The holding of the Court below would accord to interested parties in certificate cases the right retroactively to destroy or hold in abeyance the validity of Commission-accepted prices in prior certificate cases by seeking review of a price accepted by the Commission in a later and unrelated proceeding. The review provisions of Section 19(b) of the Act clearly do not intend that an initial price finally accepted by the Commission shall be rendered invalid by review for any purpose, except by observing the requirements of that section of the Natural Gas Act.

3. The Court below re-evaluated only a part of the evidence of record before the Commission and on this erroneous basis concluded there was no evidence to justify the price it found to be out of line.

Unlike this Court's *Catco* decision wherein the Court stated that there was no support in the record for the finding of need (360 U.S. at 393), there was extensive testimony in this proceeding concerning the need for the gas on the United system (R. 18-24). As Judge

Brown pointed out in his dissent, referring particularly to the factor of need, "This is no CATCO record" (Appendix A, *infra*, p. 25a). No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished. *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 239 F. 2d 97, 101 (CA 10-1956). The Court below in this proceeding stated in its opinion that "United shows it has need of, and a demand for, this Belle Isle gas to meet the present and future requirements of its customers" (Appendix A, *infra*, p. 4a). Yet the Court, unlike the Commission, apparently did not consider the fulfillment of such need—one of the Commission's most important functions—in finding that the sale without price condition is not required by the public convenience and necessity.

We set forth below[16] certain other evidence of record in this proceeding which, in addition to that listed above and in footnotes 13 and 15 *ante*, pp. 11, 12-13, was available to the Commission to evaluate in determining whether a certificate should be issued without price condition.

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[16] The gas reserves were substantial (R. 18, 27, 42); the facilities to be built by United were low in cost (R. 17) by reason of the favorable location of the gas to United's pipeline facilities (R. 12, 17, 28); the great depth of gas wells (R. 45) and the extensive development of the field over a long period of time (R. 44-46) permitted prompt delivery of contract quantity (R. 46) and large swing on daily takes of 150% (R. 43) with the convenience of a sole seller-operator to be dealt with in the whole field (R. 72). The arm's-length negotiations between unaffiliated buyers and sellers (R. 18-19, 27-30, 41-42) resulted in a price equivalent to prices being paid to others by United and other buyers (R. 24, 28, 35-36, 55-58) which was the "going price" in the South Louisiana area for the volume of gas involved in this sale (R. 57-58).

Under this Court's *Catco* decision it is the duty of the Commission to evaluate *all* the factors bearing on the public interest (360 U.S. at 391). Thus, it is respectfully submitted that the Court below erred in holding that the only evidence of record to support the price was arm's-length bargaining and competition (Appendix A, *infra,* p. 10a) and in not finding that the Commission's evaluation of all the evidence supported the issuance of the certificate without price condition.

It further appears that the Court below may have particularly considered that competition for the gas is not a factor to justify the initial price, as the Court makes, we believe, the erroneous finding that "* * * the only justification for giving the Commission the duty to regulate prices was the determination by Congress that the producers have a supply that is so restricted in relation to demand that they have the economic power to bargain for prices that will be injurious to the public" (Appendix A, *infra,* p. 5a). As far as Petitioner has been able to determine, there is no support for this conclusion in the legislative history of the Natural Gas Act.

B. This Appeal Involves Important Legal and Other Considerations

The questions presented in this petition are important to the administration of the Natural Gas Act and in providing at stable prices future sources of natural gas for ultimate public consumption. The prices which an independent producer may expect to receive for his gas as well as the expense and time required to obtain a regular certificate are material factors involved in committing new supplies of natural

gas to the interstate market. If past average prices paid by the purchasing pipeline are to be a measure of the initial price "line" for new sales as the Court below seems to hold, unless the price is related to just and reasonable prices as the Court below does hold, then these requirements of regulation must be taken into consideration by the independent producers in contracting for the sale of gas.

This Court in its *Cities Service* decision alluded to the delay incident to determining just and reasonable rates in a § 5 proceeding as that which "appears nigh interminable" (350 U.S. at 389). Since the *Cities Service* decision, the Commission on September 28, 1960 issued its decision in the *Phillips* rate case[17] in which, among other things, the Commission concluded: "Experience of the Commission in this case, as well as in many other producer rate cases during the last five years, has shown, beyond any doubt, that the traditional original cost, prudent investment rate base method of regulating utilities is not a sensible, or even a workable method of fixing the rates of independent producers of natural gas" (24 F.P.C. at 542). In this decision the Commission also stated: "From the foregoing, it follows that effective regulation of the price of natural gas must be on some more manageable plan than the rate base method" (24 F.P.C. 547). Simultaneously with the issuance of such opinion the Commission promulgated a General Policy Statement fixing area prices which will be accepted by the Commission as initial prices and as changes in rates without hearing or suspension. This General Policy Statement was called to the attention of the Court below (Appendix A,

[17] *Phillips Petroleum Company*, Docket Nos. G-1148, *et al.* (Opinion No. 338), 24 F.P.C. 537.

infra, pp. 10a-11a). Such order was subsequently amended on October 25, 1960, to include the Southern Louisiana area.[18] The prices therein adopted were not made applicable to the sale involved in this proceeding because of the pendency of this matter before the Court below. The basic price under the General Policy Statement for the Southern Louisiana area is 21.5 cents per Mcf at 15.025 psia, the initial basic price authorized in the Commission order of August 10, 1959, plus tax reimbursement, the price the Court below held had not as yet been justified. The ultimate objective of the schedule of prices included in such General Policy Statement is "to set prices in all producing areas which will be adequate to maintain the gas supplies needed by the consumers of the nation, but at prices that are no higher than are necessary to accomplish that purpose."[19]

On May 10, 1961 the Commission issued an order instituting an area rate proceeding for the Southern Louisiana area.[20] Such order was directed to more than 200 independent producers. Consolidated as a part of the proceeding were some 360 certificate application dockets and some 330 Sections 4 and 5 rate dockets.[21] In such order the Commission noted the initiation of its first area rate investigation for the Permian Basin area instituted by the Commission order

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[18] See Statement of General Policy No. 61-1, issued September 28, 1960, 24 F.P.C. 818; First Amendment to Statement of General Policy No. 61-1, issued October 25, 1960, 24 F.P.C. .....

[19] *Phillips Petroleum Company*, Docket Nos. G-1148, *et al.*, 24 F.P.C. 537, 547.

[20] *Area Rate Proceeding*, Docket Nos. AR61-2, *et al.*

[21] Includes 29 certificate dockets consolidated by an order issued May 19, 1961, in Docket Nos. AR61-2, *et al.*

of December 23, 1960. Such investigation is still in the prehearing conference stage. In such order of May 10, 1961, the Commission stated that "* * * because of the importance of the Southern Louisiana area as a source of present and future gas supply, and because of the unusually large number of pending proceedings relating to that area, we have decided to initiate a hearing to determine the initial producer area rate or rates required by the public convenience and necessity and the just and reasonable area rate, or rates, for or within the geographical area hereinafter described."

As we have pointed out herein the Court below erroneously holds that the initial price must be related to just and reasonable prices. The Commission, in the *Phillips* rate case, found that the cost of service method for determining just and reasonable rates is not a workable or sensible method for fixing just and reasonable prices for independent producers. Under the criterion of the Court below, Petitioner to justify its initial price is required to make a showing, which the Commission now says is neither workable nor sensible by ordinary methods. That Court, as we have noted, apparently would require that the price line be predicated on past prices. Moreover, the Commission, as already noted, has recently undertaken to determine the initial producer area rate or rates required by the public convenience and necessity and the just and reasonable area prices by a new concept of area prices in a very complex proceeding involving some six hundred and ninety dockets and more than two hundred independent producers. Under the present status of producer regulation it seems that the guides of *Cato* need to be made as definite and certain as possible; otherwise, it appears that further interminable delays

will occur in determining the conditions under which independent producers will be permitted to commit their gas to the interstate market. In this connection Judge Brown appropriately points out:

> "I look at this as though I were sitting in the Commission's seat. Faced with our order of remand 'for further appropriate action,' what action should be taken? Hold a hearing to develop what is already known? Hold a hearing to determine that the inevitable is really so, and that producers are free to offer or not offer gas for sale at the current market price? Or is this intended merely as an invitation to impose automatically some kind of price condition? If so, where will it be fixed? * * * Finally, the Commission can well ask, how are we ever to catch up with the staggering load of § 4 and § 5 proceedings if to that burden we must now add two others—a full dress rehearsal hearing for every certification or the equivalent of a § 4 suspension proceeding through the guise of a price condition? * * *
>
> "I am confident of only one thing: this case will be back several years and thousands of pages later. No one will know more than is known now" (Appendix A, *infra,* pp. 28a-29a).

CONCLUSION

The decision and judgment of the Court below ordering that the Commission's order issued August 10, 1959, be set aside, we respectfully submit, should be reviewed by this Court, because they are not in accord with this Court's *Catco* decision in the respects set forth herein; and, upon review, should be set aside and the Commission's order affirmed.

Accordingly, pursuant to Section 19(b) of the Natural Gas Act and Paragraph 1(b) of Rule 19 of the

Rules of this Court, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

JOHN A. WARD, III
1608 Walnut Street
Philadelphia, Pennsylvania

JOINER CARTWRIGHT
HERF M. WEINERT
P. O. Box 2831
Beaumont, Texas

MARTIN A. ROW
P. O. Box 2880
Dallas, Texas

ROBERT E. MAY
OMAR L. CROOK
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioner,
Sun Oil Company

By ROBERT E. MAY

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18112

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

Petition for Review of an Order of the Federal Power Commission

(February 22, 1961)

Before TUTTLE, Chief Judge, and BROWN and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: This case presents the identical problem heretofore resolved by the Courts of Appeal for the 9th Circuit in *United Gas Improvement Co.* v. *F. P. C.*, — F. 2d —, and the District of Columbia Circuit in *New York Public Service Commission* v. *F. P. C.*, — F. 2d —, decided December 8, 1960, 29 Law Week, 2273, and now pending after argument in a companion case in the 10th Circuit. Petitioner here also contends that it has been resolved by the United States Supreme Court by directing a reversal (see 361 U.S. 195) of the 3rd Circuit decision in *United Gas Improvement Company* v. *F. P. C.*, 269 F. 2d 865.

The issue is whether the Commission erred in granting a certificate of public necessity and convenience without condition to Sun Oil Company authorizing it to sell gas produced from the Belle Isle Field in Southern Louisiana at an initial base price of 21½¢ per Mcf, plus reimbursement of Louisiana severance and gathering tax of 2.3¢ per Mcf, plus 75% of any new taxes thereafter imposed. The issue must be resolved by a determination whether the Commission observed the standards requiring the "most

careful scrutiny and responsible reaction" which the Supreme Court said is required to be given by the Commission to "initial price proposals under Section 7" of the Natural Gas Act, 15 U.S.C.A. § 717(f). *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 391.

Not only the deference due the studied and careful conclusions of the two other Courts of Appeals, but on our own study of the Atlantic Refining Company case (now known throughout the industry as the CATCO case) compels us to conclude, as the other courts did, that the record before us does not support the determination that the certificate of public necessity and convenience should unconditionally issue in light of the strictures in the CATCO decision.

The essential facts developed in the record before us are: The Sun Oil Company filed an application on May 19, 1958, under Section 7 of the Natural Gas Act, seeking a disclaimer of jurisdiction or in lieu thereof a certificate of public convenience and necessity authorizing the sale of natural gas to the United Gas Pipe Line Company (United) from Sun's onshore production in the Belle Isle Field, St. Mary Parish, Louisiana. Sun is a New Jersey corporation. Its principal place of business is located at Philadelphia, Pennsylvania. Its application was numbered G-15122.

The United Gas Pipe Line Company also filed an application on May 19, 1958, under Section 7 of the Natural Gas Act, seeking a certificate of public convenience and necessity authorizing it to construct and operate certain facilities, estimated to cost $1,176,175.00, to connect with its presently existing natural gas transmission system, which would enable it to purchase, receive and transport in interstate commerce the natural gas produced by Sun in the Belle Isle Field in St. Mary Parish, Louisiana.

By an order issued on January 5, 1959, the Commission permitted the interventions of United Gas Improvement Company and Public Service Commission of New York.

As provided in the Commission notice dated November 26, 1958, a hearing was convened on December 30, 1958, but, on account of the petition to intervene by U.G.I. and the notice of intervention by PSC-NY, was recessed to January 27, 1959, on which date a formal hearing was held and concluded.

The source of the natural gas to be produced by Sun and sold to United, if certificated herein, is from leases or other interests in minerals owned or controlled by Sun in the Belle Isle Field, St. Mary Parish, Louisiana. No gas is to be purchased by Sun from third parties to effectuate this proposed sale. The Belle Isle Field is not a new discovery. The discovery well was drilled in 1940. Since then Sun has drilled some sixty-five or more wells in this field; twenty-one were dry holes. The record shows that at the date of this hearing Sun had in this field eight producing gas wells, twenty-seven producing oil wells and ten temporarily abandoned wells that are to be recompleted as gas wells. There has been continuous exploration in the field since the discovery of the original gas well in 1940. The gas being produced in the Belle Isle Field is sweet, dehydrated gas, the major portion being gas well gas. Under the terms of the sales agreement Sun will dehydrate the gas being sold to United.

United submitted an offer to Sun for the Belle Isle Field gas early in February, 1958. After much negotiating and several bargaining sessions a sales agreement was executed in May, 1958. Each party to the sales agreement was willing and interested in concluding a contract but neither party was under any compulsion to do so. This record shows no affiliation between Sun or United and the two companies have no common officers or directors. United says it conducted its negotiations, which culminated in an

agreement, with the objective of purchasing the Belle Isle gas from Sun on terms suitable to United and at the lowest possible price.

United shows it has need of, and a demand for, this Belle Isle gas to meet the present and future requirements of its customers. United now delivers more than one trillion cubic feet of natural gas per year to its customers and the demand on it for additional natural gas increases each year. United agrees to pay, and Sun agrees to sell, the Belle Isle Field natural gas for an initial price of 21.5 cents per Mcf at 15.025 psia plus state taxes, which are shown to be 2.3 cents per Mcf, thus producing a total cost price to United of 23.8 cents per Mcf. The sales agreement provides for 2 cents increase in price per Mcf each four-year period of the twenty-year agreement until a total price of 29.5 cents per Mcf, plus tax, is reached. United says that Belle Isle Field is exceptionally well located for them since it is approximately 12 miles from a United 26-inch and a 30-inch main pipeline. Because of the proximity of this gas to its system main line United was anxious to acquire the total field production feeling it to be in the best interests of its customers by adding this sizeable reserve.

The other sales agreements of United do not contain a "favored nation" clause, hence existing contracts will not be triggered into higher prices by this contract.

United contends, if they expected to purchase this gas, and they maintain they need it, that the demand upon them for additional gas supplies by their present customers requires them to purchase same for the public convenience and necessity, therefore in order to purchase this gas they would be required to offer Sun the current market price, or better, hence the 21.5 cents per Mcf offer.

United's system-wide average cost of gas in 1957 was estimated to be 11.7 cents per Mcf—a United witness testified it had probably gone up a cent or a cent and a half per

Mcf in 1958—and this purchase of the Belle Isle Field gas would increase this average cost by less than one tenth of one cent per Mcf. The intervenors contend any certificate issued by the Commission should be conditioned to a maximum of 17 cents to 18 cents per Mcf.

As we have previously stated in *Bel Oil Corp.* v. *F. P. C.*, 5 Cir., 255 F. 2d 548, 553, a price paid for gas as the result of arm's length bargaining with the producer is not, merely because bargained for in a highly competitive market, "just and reasonable" within the intendment of the Natural Gas Act. See also *New York Public Service Com.* v. *F. P. C.*, D.C. Cir., — F. 2d —, decided December 8, 1960, 29 U.S. Law Week 2272. This is so because the only justification for giving the Commission the duty to regulate prices was the determination by Congress that the producers have a supply that is so restricted in relation to demand that they have the economic power to bargain for prices that will be injurious to the public. "The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas." *F. P. C.* v *Hope Natural Gas Co.*, 320 U.S. 591.

We consider the foregoing comment appropriate at the outset of the discussion of this case, because we perceive that most of the Commission's approach to the certification procedures, until stopped by the Supreme Court in CATCO, was subject to the same criticism which the Commission itself was successfully leveling at the producers in the Section 4 proceedings: that the Commission was permitting the initial filing prices to be fixed by the producers merely on a showing, *so far as price justification was concerned*, that they had been bargained for at arm's length, or that they were not higher than a price someone else was then paying in the area.

Thus, at the very threshold of the regulating procedure newly contracting producers were being permitted to charge prices for their gas that were in some instances

30% to 50% higher than earlier prices that were at the very time being suspended by the Commission pending hearings under Section 4 procedures. This inconsistency that concededly arose largely because of the sheer magnitude of the problem of processing the certification proceedings on any other basis, is what the Supreme Court brought in question and corrected in the CATCO decision.

This record discloses that United, the purchaser in this contract from Sun, had been purchasing gas in 1954 at from 9 cents to 12 cents per Mcf in the South Louisiana territory. The testimony of C. C. Barnett, Vice President of United in charge of the gas supply department, as to the move upward from that figure is significant:

> "Q. Well, it just seems to me that it can be simply stated that the new high prices do tend to establish new floors for prices. A. Well, I think that you are—you are probably correct in that. I won't go all the way to it, but in about 1954 we were buying gas in South Louisiana at around nine to twelve cents, and Gulf Interstate was certificated and they were paying the enormous amount of 20 cents.
>
> Q. That is the Erath Field, is it not? A. In the Erath Field. And of course they bought one big package. There was a trillion foot field and they wanted it. So they paid 20 cents for it then.
>
> About six months or a year later, American Louisiana came in, and instead of paying 20 cents for a trillion foot field they paid 20 cents for smaller fields. And there can be no argument about it that that had brought the price up."

This discussion by the responsible parties who fixed this initial price makes it perfectly plain that a substantial part of the increase from "nine to twelve cents" to 21½ cents resulted from the tremendously increased demand as contrasted with the available supply. In stating that this is plain from the record before us, we, of course, do not say that a substantial part of the increase may not also be

attributable to increased costs, nor do we decide that the nine to twelve cents price was a just and reasonable figure. We do know that virtually every increase resulting from escalator clauses or from the operation of "favored nations" provisions in existing contracts was being subjected, during this four year period, to Section 4 hearings for reasonableness.

Apart from any decision of the Supreme Court, it does not seem reasonable or consistent with any understandable policy of Congress that the Commission would, as an illustration, permit the filing of initial price of 20 or 20½ cents, resulting in the collection of that rate until set aside by a Section 5 proceeding (found by the Supreme Court and conceded by all parties to be practically ineffectual because of the volume of business under Section 4) and, on the same day, suspend an automatic increase under an escalation clause from 9 to 15 cents.

In dealing with this problem, the Supreme Court said in *Atlantic Refining Co.* v. *Public Service Commission*, *supra*:

> "In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under section 7(e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in section 5 proceedings through which intial certificated rates are reviewable appears nigh interminable. Although Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, was decided in 1954, cases instituted under section 5 are still in the investigative stage. This long delay without the protection of refund, as is possible in a section 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under section 7 makes it the more important, as the Commission itself says, that 'this crucial sale should not be permanently certificated unless the

rate level has been shown to be in the public interest,' 17 F.P.C. 563, 575.

. . .

"It is true that the Act does not require a determination of just and reasonable rates in a section 7 proceeding as it does in one under either section 4 or section 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of section 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under section 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for section 7(e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.

"There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in section 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary."

The parties here belabor the question: what is the "line" as envisaged by the Court in the language quoted above, "out of line" and "hold the line"? The principal question here is whether the line is established by proof of what others are paying under certificates that were either uncontested or were being appealed and are thus "suspect," or what others are paying based on such "suspect" rates, or what even unregulated intrastate purchasers are paying. We agree with much that is said in the Ninth Circuit opinion, supra, which is in turn adopted by the Court of Appeals for the District of Columbia:

> "When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line. In the event the existing rate is later modified or conditioned as a result of the pending proceedings the foundation of the line derived therefrom would be undermined. Moreover, the acceptance of questioned existing prices as a guide in setting the line might itself have the anomalous effect of creating a standard by which the questioned rates would then be judged.
>
> "For the reasons indicated we are of the opinion that it would be an abuse of discretion for the Commission in establishing a price line to rely upon producer prices which are under such a cloud.
>
> "We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings."

We think it too plain for argument that the first court tested and court approved certificated sale at a price much

higher than any theretofore certificated according to the standards found by the reviewing court to be consonant with CATCO will unquestionably breach "the line". Such, we think, would be the effect of our approval of the certificated price in this case.

We do not attempt to determine what the "line" is on this record. We have no doubt that in this case the price of 23½ cents per Mcf, including the tax reimbursement,[1] was out of line as the term was used by the Supreme Court. The only evidence on this record that supports such "out of line" price is the fact that it was negotiated at arm's length and was required by the intense competition. This, as we have said, is not enough. It was clearly incumbent on the proponent of such a rate to make some showing of the "reason why" (as it was expressed in the CATCO opinion) 21½ cents, excluding tax, is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure.

We are fully aware of the criticism that has been leveled at any regulatory scheme that keeps sums now approaching three quarters of a billion dollars subject to refund pending final determination of just and reasonable rates. However, we take notice of the fact that the log jam is now breaking, as witness the decision in the Phillips Petroleum Company case, F.P.C. Op. # 338, and it may be hoped that appropriate formulas for resolving the other section 4 cases may soon be forthcoming. The Commission is at least making a strong bid to that end by the publication of

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[1] It was testified and the Commission found that the 2.3 cents tax reimbursement was an element of bargaining. Thus, while it may represent actual reimbursement for taxes paid, it is an element of cost to the purchaser, and in negotiating contracts purchasers do not always agree to reimburse the entire tax burden. The agreement here to pay 21½ cents plus full reimbursement for currently collected taxes, was found by the Commission to be a new high rate for United and for the area.

its Area Price Level schedules. See Statement of General Policy # 61-1, issued September 28, 1960.

We conclude that the order here under attack must be set aside and the proceedings remanded for further appropriate action by the Commission.

It is so ORDERED.

BROWN, Circuit Judge: I dissent.

A true copy.

Test:

EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

May 31, 1961.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18112

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

No. 18113

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

Petitions for Review of Orders of the Federal Power Commission

(February 23, 1961)

Before TUTTLE, Chief Judge, and BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge, dissenting: With the score now four down and none to go[1] and eleven distinguished judges arrayed unanimously against but one, the prospect of a dissent is indeed a formidable one. To the usual one of likely ineffectiveness, it runs the additional risk of marking its author presumptuous, arrogant or ignorant. But with all the deference which this distinguished company of judges inspire, I cannot down the conviction that this decision, and the others on substantially the same record, are

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[1] Public Service Commission of New York v. FPC, D.C. Cir., 1960 [No. 15461, Dec. 8, 1960], . . . F. 2d . . ., Public Service Commission of New York v. FPC, D.C. Cir., 1960 [No. 15412, Dec. 8, 1960], . . . F. 2d . . .; United Gas Improvement Company v. FPC, 9 Cir., 1960, 283 F. 2d 817; United Gas Improvement Company v. FPC, 10 Cir., 1961 [No. 6280, Jan. 1961], . . . F. 2d . . ., announced subsequent to the preparation of the majority opinion; and finally the two cases of this Court.

wrong. More than that, claiming that the duty to hold the line is imperative because the administrative process creaks with sluggish inefficiencies, the consequence of this action is to add to that delay. That would be a small price, I suppose, were something to be gained. But by the nature of things—and here the "thing" is the *voluntary*, non-compulsory nature of the *first* sale of gas by a producer in the midst of an insatiable expanding demand for gas—the evidence to be offered on remand to the Commission will perhaps have formal attributes making it more imposing, but in actuality it will be what is now known and proved. The Commission will not in fact be better informed on fact. It will merely have a record—probably stupendous in length, in size and number of exhibits and in avoirdupois weight[2]—to establish what it now knows and on which knowledge Congress declared it was entitled to determine whether the public interest called for the certification of a new sale of gas for resale.

Running through the majority's decision are assumptions or conclusions which I regard as basic errors. The decision misapprehends what it was that *CATCO* condemned. The opinion mistakenly delineates the mission of the FPC and a reviewing court as one to hold down prices. It erroneously equates regard for the protection of the ultimate consumer with some character of duty to prohibit price increases. In doing so, it loses sight of the fact that neither the FPC nor a reviewing court—including even the highest

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[2] The target for criticism of delay and lumbering inefficiency as recent quasi public reports reflect, is generally the administrative agency. But judges hearkening unto advocates protesting the absence of record "proof" must bear some of the responsibility. The problem is of national concern. This is attested by the President's action on the recommendation of the Judicial Conference for the creation of a Permanent Conference on Administrative Procedure. Many share the hope that Chief Judge Prettyman, now active in the formulation of such a conference, will help lead us from a sometime-judge-made wilderness.

one—has any power to digress from the statutory duty or standard. Discussing these standards, there is interlaced in every conclusion a confusion of the "just and reasonable" test for rates under §§ 4 and 5 with the requirement for certificating a new service that "is or will be required by the present or future public convenience and necessity * * *," § 7(c).

It is this staggering administrative problem[3] which should itself make us cautious lest we add unwittingly to it. What we hold in these two cases, and that by our sister Circuits in the others, note 1, supra, is but the infinitesimal drop in the bucket—perhaps more accurately called a molecule out of trillions of cubic feet of gas. For if this unindicated additional evidence is required in these, so must it be in everyone of the hundreds soon to follow if the ever increasing demand of consumers for more and more gas is to be met. The alternative, of course, is to impose some sort of price condition on every certificate. But that is not administration under law. That is the mechanical application of an arbitrary practice as the easy way out.

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[3] The FPC in its celebrated opinion No. 338 in the Phillips Petroleum Company rate case [September 28, 1960]. . . . FPC . . ., took candid note of this. With 3,372 independent producers with rates on file plus 15,435 non-filing co-owners, the Commission had then to deal with 11,091 rate schedules with 33,231 supplements. At that time 3,278 rate increase filings of 570 producers were under suspension awaiting hearing. Unless staff and budget relief is granted, it will take 13 years to dispose of these 2313 cases. In the meantime another 6500 cases would have been filed. This led the Commission to summarize it this way. "Thus, if our present staff were immediately tripled, and if all new employees would be as competent as those we now have, we would not reach a current status in our independent producer rate work until 2043 A.D.—eighty-two and one half years from now. Of course, we could expect to improve our techniques and thus shorten the time required to process these cases. If we increased our efficiency one thousand percent, we would achieve current status in 1968—eight and two tenths years from now. * * *"

I do not think *CATCO* had any such consequences in mind.

Worse than creating this administrative Jack-and-the-bean stalk, the requirements of the majority, adopting especially those voiced by the Ninth Circuit, see note 1, supra, brings about an administrative impasse. A local distributing company such as UGI and PSC, whether possessing an opportunity to intervene "as a matter of right," or not, have it within their power to prevent any rate from being considered by the FPC as evidence of an existing "line". If they are allowed to intervene, they may appeal the FPC certification as they have done here. Pending the decision of the appeal, that purchase—because it is somehow under a cloud or is "suspect"—has no legal existence as evidence. If intervention is denied for the reason, say, that the likely impact of such rate on any such distributor is too remote, then that rate may not be used as evidence of the line simply because the one challenging the instant rate was denied the right to attack the prior rate offered as evidence of the line. It is no answer to say that this infirmity terminates when the appellate process in such instances is completed. In the meantime, the current applicant for certificate can get nothing. He may not use the other rates to prove the increased "line". That means, of course, that the line will remain static, that it may never increase. If *CATCO* purports to forecast that as a necessary result, I find no basis in the Natural Gas Act for it.

This Court as much as declares that this is required. For the key to its opinion is likely found in these words:

> "We think it too plain for argument that the first court tested and court approved certificated sale at a price much higher than any theretofore certificated according to the standards found by the reviewing court to be consonant with CATCO will unquestionably breach 'the line'. Such, we think, would be the effect of our approval of the certificated price in this case."

That has disturbing implications. Does it mean that we have some mission not to decide a case lest it be capable of subsequent use as evidence of a higher "line"? If, as the Court puts it, "the standards found by the reviewing court to be consonant with CATCO" forbid, as the majority and these other cases hold, reliance upon any increased price until such certification is court-approved, how may there ever be a price higher than pre-CATCO?

The fundamental error in all of this is that it is a court intrusion on the expertise committed by Congress to the FPC. Nothing under § 19(b) of the Act makes FPC action a nullity while it is being challenged in court. The record of this Court in denying applications for stay in rate orders shows that we regard Commission decisions as of continuing vitality unless some strong circumstance compels holding them in abeyance. *Tennessee Gas Transmission Co.* v. *FPC*, 5 Cir., 1960, 283 F. 2d 729. Just what is there about this which withholds the imprimatur of law until the judge has spoken? Does the whole machine stop when an appeal is taken? In the meantime, what happens to the Commission's serious duty to consider the imperative public interest in obtaining an assured supply to satisfy the insatiable demand for more and more gas?

Of course, I may not ignore the emphatic importance which *CATCO* attributes to price. But what that case had to deal with reflects no purpose in what was there said to make the § 7 public convenience standard one merely of a simple arithmetical inquiry: is this price higher? Nor was it intended that if the answer were "yes" that that automatically made it contrary to public convenience and necessity thereby setting automatically in train the price condition.

CATCO came up on a bare bones record with some macabre-like implications. There was no proof whatsoever of the need for the gas, the likelihood that it would be lost to the interstate market if the sale were not certificated,

or the relation of the proposed 21.5¢ mcf price to others. Worse than that, it showed that twice the Commission was so disturbed about price that it imposed a price condition. This was followed by its final order in which, under the coercive economic pressures which the nature of this Act gives to non-jurisdictional producers, it capitulated presumably out of regard for what it considered was an imperative need for this large gas supply.

It was this apparent legal indifference to price as an element which was condemned by what the majority calls the "strictures" of *CATCO*. The element must be taken into account and this "requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." 360 U.S. at 391. While rates are not the only factor under § 7(e), the historic increase in the cost of gas "does make price a consideration of prime importance." 360 U.S. at 391. This leads the Court to conclude that "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." 360 U.S. 391.

But this was certainly no declaration as the law of the Meads and Persians which altereth not, that a price ostensibly higher than the last one ipso facto "signals the existence of a situation * * * not * * * in the public interest * * *." Nor is that to be found in these later comments of the Court. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. at 391.

A price may be higher and yet quite "in line". If thus "in line" it does not come within the category condemned by the Court as one "not in keeping with the public inter-

est." And it is at this point that the nature of the administrative function and the nature of the judicial function be carefully distinguished. What is "out of line" is primarily for the judgment of the administrative agency charged with the effectuation of the total policy of Congress. *CATCO* now requires that responsible inquiry be made by the FPC. But CATCO does not undertake to spell out just *what* the line is or *how* the Commission is to go about determining it. The term "out of line"—nowhere found in the Natural Gas Act—is a handy colloquialism which, if it means anything at all, must convey the connotation of the more familiar term "abuse of discretion"—i.e., is the proposed increase so great as to indicate arbitrary action without reasonable support in the practicalities of the regulated gas industry?

Obviously the Court could not have meant the term to be, as a matter of law, any price which exceeds in any degree the last and highest one. For that would have been to ignore the unique rate mechanism of the Natural Gas Act which commits rate *fixing* to the gas producer. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 *United Gas Pipe Line Co.* v. *Memphis Light Gas and Water Div.*, 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed. 2d 153. While any such increase is subject to limited suspension and collection under bond under § 4 and is always subject to review under § 5, automatic stepped up escalation increases become the legally effective rate. The "going rate is therefore more than the last and most recent § 7 certification of a new sale. It must take into account the geographically relevant currently collectible rates under long existing certificates or rate schedules. This, of course, calls for the nicest of delicate judgments running the whole gamut of the gas industry on the type or kind of gas, the area, field, production problems, volumes and the like.

It is inescapable that there will always be some difference —if not on the day of certification, then at some future

time as this complex of thousands of rates undergoes its automatic undulations. The question then is: *who* is to measure the difference? More important, *who* is to determine whether the difference is too much?

The Commission, with the teaching of CATCO before it, considered that these sales were required by the public convenience and necessity and when contrasted with comparable sales, the price was not out of line. Now the majority holds that there is no evidence to support it and remands the case either for more evidence or the imposition of some unindicated conditions. The Court is vague as to the infirmities of the proof. It points out that United's system-wide average cost was 11.7¢ mcf and that United had been purchasing gas in 1954 at a price from 9 to 12¢ mcf. With so much water over the dam since 1954, I am at a loss to understand how that year has anything to do with a "line" in 1958. Actually, as the opinion reflects in the quoted testimony from United's Vice President, that year marked the beginning of 20¢ gas under certifications for new sales of huge volumes.[4]

While I have some trouble in discerning just what it is the majority concludes, it does not seem likely that it considers this difference of 1½¢ between 20¢ and 21.5¢ as itself "out of line." Somehow the Court wants to ignore the actual fact of those significant certifications which obviously had an influence in subsequent price levels.[5] It concludes that we must go back to 1954 when it says:

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[4] This refers to the certificates issued in 1953 and 1954 in the Matter of Gulf Interstate Gas Company, Docket No. G-2058, opinion 251, 12 FPC 116, May 20, 1953; and the Matter of American Louisiana Pipe Line Company, Docket No. G-2306, opinion 276, 6 PUR 3d 476, October 1, 1954.

[5] UGI and PSC acknowledge that the price level increased to at least 17¢ and it is a rate of 17¢ to 18¢ which they suggest as a price condition. They do not, therefore, insist on rolling it back to 1954.

> "The only evidence on this record that supports such 'out of line' price is the fact that it was negotiated at arm's length and was required by the intense competition. This, as we have said, is not enough. It was clearly incumbent on the proponent of such a rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) 21½ cents, excluding tax, is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure."

Two questions immediately arise: first, how did the Court reach this legal conclusion? Second, what sort of hearing is contemplated on the remand, i.e., what kind of evidence will constitute the "showing of the 'reason why' "?

The first is the more readily answered. Running throughout the Court's opinion is the confusion of the "just and reasonable" standard for rates under §§ 4 and 5 with the public convenience and necessity test of § 7. It emphasizes this by stating of our decision in *Bel Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F.2d 548, 553, that "A price paid for gas as the result of arm's length bargaining with the producer is not, merely because bargained for in a highly competitive market, 'just and reasonable' within the intendment of the Natural Gas Act." Presumably it is on this that the Court knocks out the undisputed evidence and the categorical finding of the Commission that these contracts were consummated after vigorous, genuine arm's length bargaining. But *Bel Oil* must be read in the light of our subsequent opinion in *Forest Oil Corp.* v. *FPC*, 5 Cir., 1959, 263 F.2d 622, which recognizes that the Commission in a rate proceeding is entitled to consider area or field factors.[6] And, of course, no one questions that the price involved here is the area price.

[6] There we said: "If the Commission finds that a rate is reasonable to the consuming public it need not reject such rate as not being just and reasonable merely because it will yield to a particular producer more than the very minimum required by

But apart from the intrinsic standard to test "just and reasonable" the majority treats the certification problem as though it were a rate hearing. It does this in the plainest of words. It likens the CATCO criticism of FPC to the Commission's criticism of § 4 rate increases substantiated only by showing of arm's length bargaining and a competitive field price. It follows this with the statement, "Thus, at the very threshold of the regulating procedure newly contracting producers were being permitted to charge prices for their gas that were in some instances 30% to 50% higher than earlier prices that were at the very time being suspended by the Commission pending hearings under Section 4 procedures. * * *" That, in

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constitutional standards or more by way of net yield than is returned to another producer in the same well or field, especially if such result follows from a considered decision by the Commission that a uniform price for all the producers or a single well or a single field is not only reasonable but is also highly desirable for convenience of administration. This is what the Commission did in Order No. 310 [Pan American Petroleum Corporation et al]."

This idea of a field or area price now seems to bear fruition in the Area Price Levels Schedules set forth in the statement of General Policy No. 61-1 September 28, 1960, amended to include South Louisiana October 25, 1960, and now promulgated in the form of an official regulation, see . . . .

Our decision and opinion in that case strongly influenced the Commission in the Phillips Petroleum Company decision opinion No. 338, note 3, supra, in which it abandons the effort to determine rates on the fair rate of return point of departure theory of City of Detroit v. FPC, D.C. Cir., 1956, 230 F. 2d 810. As to this, it said, "If this contention is correct, then, as a practical matter, adequate regulation of producers appears to be impossible under existing law.

"Nowhere in the Natural Gas Act is there as much as one word which indicates that this Commission must use a rate base in determining just and reasonable rates. The correct construction of the Natural Gas Act on this question, both as a legal and as a practical matter has been made by the Court of Appeals of the Fifth Circuit in Forest Oil Corporation v. FPC * * *." .

turn, leads it to this main conclusion: "Apart from any decision of the Supreme Court, it does not seem reasonable or consistent with any understandable policy of Congress that the Commission would, as an illustration, permit the filing of initial price of 20 or 20½ cents, resulting in the collection of that rate until set aside by a Section 5 proceeding * * * and, on the same day, suspend an automatic increase under an escalation clause from 9 to 15 cents."

Presumably the majority states "Apart from any decision of the Supreme Court" purposefully. For surely CATCO does not warrant any such conclusion. On the contrary, that decision sought to make very clear that the two problems were quite distinct and that price was not to be measured in terms of "just and reasonable." The Court states, "It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." 360 U.S. at 390-91.

Apart from the CATCO decision the statute itself bears evidence that different things are involved in § 4, § 5 and § 7. It is not for us to say that Congress ought to have made all of the elements of these three sections and the balance of the Act consistent. The standard for a new service or a new sale is not that the proposed price is "just and reasonable" but that the proposed service at the proposed price "is or will be required by the present or future public convenience and necessity." That can account for quite dissimilar actions as between an application for a new certificate and a request to increase a rate under an old one. In the one the standard is public convenience and necessity. As to that, rates are not "the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors

bearing on the public interest." 360 U.S. at 391. In the other the inquiry is what rate is "just and reasonable"?

One thing which surely makes a vital distinction is the difference between the power and the function of the Commission in the one as compared with the other. As to a sale under an existing certificate the gas is dedicated to jurisdictional use for the life of the reserves. *Sun Oil Co.* v. *FPC*, 1960, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639; *Sunray Mid-Continent Oil Co.* v. *FPC*, 1960, 364 U.S. 137, 80 S. Ct. 1392, 4 L. Ed. 2d 1623. The Commission need not concern itself with the availability of that supply of gas. What, and all it need consider, is the price which will be just and reasonable to producer, consumer and the public alike.

What a different function it bears as to a proposed new sale. A new and perhaps overriding consideration now comes into play. That is the demand for gas. Here it is no longer the relatively "simple" task of drawing the line of just and reasonable. Now the question is not how much to pay, but how badly is this gas needed? At this point it is not for judges to rewrite the law. This may appear to give gas producers an economic ax. But that is the way the law was written. Until the sale is certificated, there is "nothing illegal in the [producers'] rejection of the alternative price proposed by the Commission and their standing firm on their own." 360 U.S. at 388.

Of course, CATCO now teaches that the Commission may not be overriden completely by this "overriding" consideration. If the price insisted upon is one which the Commission after careful consideration thinks will work a real wrong on the public interest, the minimum it must do is issue a conditional certificate. But there is in this a risk to the vital public interest. Insistence on a price condition in a borderline case may result in the producer withdrawing the application altogether. It is easy to say that if that happens, all well and good,

because no one should be given that much power over the control of precious natural resources so badly needed. But what American industry and its exploding metropolitan-based population needs is not such politico-economic platitudes. What it needs is gas. And it is initially in the hands of the Commission to determine whether gas tentatively proffered is finally to be delivered. The risk to the public interest in the possible withdrawal of proposed sales becomes only more acute if, as UGI and PSC urge, and this Court now holds, the Commission should automatically impose a price condition if a price proposed in 1960, or 1970, or 1980 is greater than 1954.

If there ever was a place where truly it could be said that this called for the most expert judgment of those skilled in the problem, this must be one. Not only does it call for a nice balancing of demand and need against possible price impact, but it necessarily calls for a prescience as to the future. *United States* v. *Detroit & Cleveland Navigation Company*, 1945, 325 U.S. 236, 66 S. Ct. 75, 90 L. Ed. 38. We are dealing with long term contracts which are long term whether so written or not, *Sun Oil Company* v. *FPC*, 1960, 364 U.S. 170, 80 S. Ct. 1388, 4 L. Ed. 2d 1639. When faced with the problem in 1961 of securing for the interstate regulated market gas reserves in the trillions of cubic feet that will be producing in the year 1980, and conceivably in the year 2000, when our population will be 272,557,000[7] and over 350 million, I doubt seriously that the Supreme Court meant to declare for all time that a cent or two cents difference between the proffered price and the most recent one, must compel the Commission to risk the loss of this urgently needed gas.

What I am saying is that this must be a judgment for the Commission. Judgment is more than a simple

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[7] Statistical Abstract of the United States 1960, No. 3, *Projections of the Total Population*, at p. 6.

arithmetical comparison of two prices. A considerable latitude must be granted the Commission. This may be safely done for if, in a twilight zone case, the Commission determines that the public interest is best served by securing a perpetual dedication of the gas reserves, it still has the potent remedy of a § 5 hearing. If the Commission is not occupied and preoccupied with useless hearings of the kind we now order, I am confident that it could, with some needed help from Congress for an adequate staff, proceed to expeditious decision on the issue of "just and reasonable" rates.

So we come, as they say in field notes, to the place of beginning. What sort of hearing is to be had on remand?

Surely it will be an affectation to have further proof on the imperative need of United and Transco for this gas. This was no CATCO record. Here the proof abundantly shows the extent of their needs and the supply to satisfy those needs. In the *Sun* case the reserves are calculated to be 372 billion cubic feet. Sun is dedicating 10,259 acres to the performance of the agreement with United. The majority repeats verbatim with apparent approval the Commission's finding that "United shows it has need of, and a demand for, this Belle Isle gas to meet the present and future requirements of its customers. United now delivers more than one trillion cubic feet of natural gas per year to its customers and the demand on it for additional natural gas increases each year." As to the sale by Superior to Transco, the evidence supports without any serious attack all of the Commission's conclusion. "Transco currently uses approximately one-half trillion cubic feet of natural gas per year. The Superior reserves will meet Transco's system supply for about six months, thereby assisting the company to maintain the inventory of its system gas supply in the face of heavy annual depletion and ever-increasing annual demands by Transco's customers." Superior "owns approximately

30 percent of the dedicated reserves in" this off shore field and by its acquisition of the reserves "Transco has been able to acquire what in the opinion of the company is probably the largest single reserve ever contracted by Transco." The "facts disclose that Southern Louisiana is the only area in which Transco has been able to acquire substantial volumes of uncommitted reserves during the past two years. It has sought unsuccessfully to acquire additional reserves at an initial price of 17¢, and is obliged, if it is to continue to meet the customer requirements it has undertaken to meet, to pay producers in Southern Louisiana a price which will induce them to sell the gas."

What then about the price? What sort of evidence will there be, and what in reality will it teach, as a "showing of the 'reason why' * * * 21½ cents * * * is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure."?

There may be good basis for deploring it, for wishing that it had not come to pass, but there can be no doubt as to why 21½¢ was agreed upon as the price in 1958. That was the result of the ever-increasing demand for gas and relative lack of supply. This is the result of an interplay of several factors, all of which must be known to the Commission. The first is the tremendous post-war investment in long line transmission system. Billions of dollars have been spent to bring this gas to metropolitan and industrial markets.[8] Gas which, before the war, had little economic value, has increasingly been the subject of an ever-growing demand. The more pipelines built, the more the consuming areas have converted to gas. The greater the conversion, the more the demand.

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[8] I do not for the moment suggest these expenditures constitute an element of the producers' fair price whether on a rate base or otherwise.

Had this operated in a traditional public utility field, regulation of the price would have restrained the impact of demand on supply. Here comes into play the second factor. We are not really dealing with a service. An "independent producer," Mr. Justice Harlan pointed out, "is unique among the objects of public-utility regulation because it is not engaged in rendering a service to the public in the conventional sense of that concept, but rather simply in selling a commodity which it owns. * * *" *Sunray Oil Co.* v. *FPC*, 364 U.S. 137, 160 (dissenting). The producer is free of regulation until he sells and is certificated. No one may compel him to sell. He has no duty to sell at a "just and reasonable" rate. Indeed, an operator *vis-a-vis* his co-owners probably has the legal duty to exact what the traffic will bear. As it is entirely a voluntary thing whether a person wishes to subject himself and his specific gas reserves to public regulation, that decision is normally determined by *price*. Third, as between prospective purchasers, and especially long line transmission systems, there is no public authority to determine who shall have the right to procure gas from a prospective producer-seller. That means that to meet the increasing demand resulting from their expanded facilities (factor one above), the public utility buyers now compete with one another in obtaining gas from the free agent—the producer under no compulsion to sell. Finally, there is competition by intrastate users, and non-jurisdictional industrial users. *FPC* v. *Transcontinental Gas Pipe Line Corp.* 1961,..... U.S..... S. Ct..... .....L. Ed. 2d ..... [January 23, 1961, Nos. 45 & 46].

The proof was uncontradicted that United and Transco had tried earnestly to obtain these needed major supplies of gas at a lower price. They were unsuccessful because this was now the market. No one doubts the sincerity or truthfulness of these witnesses. No one has even faintly suggested that there will be found any witness anywhere

who will say that gas in those volumes under these conditions will be obtainable in Southern Louisiana at the figure now suggested by UGI and PSC of 17-18¢ mcf.

What good then is to be served by a hearing? How can there be any other explanation of the "reason why" gas cannot be purchased in 1958 at 1954 prices? Is the need for a record to substantiate administrative action so much a legal formalism that we compel an overworked and understaffed agency to hold a hearing that will only gild the lily?

Things would be different had the Commission, as it did in CATCO, capitulated on the element of price. Here against a known, informed judgment born of long experience and knowledge of the general price levels in the neighborhood of 20¢, it reached the conclusion that this price was consistent with the public convenience and necessity. All of the elaborate evidence, charts and exhibits, economic studies, estimates of gas reserves, and the like cannot possibly change the picture which it knew at the time these orders were entered and which it has known all along.

I look at this as though I were sitting in the Commission's seat. Faced with our order of remand "for further appropriate action," what action should be taken? Hold a hearing to develop what is already known? Hold a hearing to determine that the inevitable is really so, and that producers are free to offer or not offer gas for sale at the current market price? Or is this intended merely as an invitation to impose automatically some kind of price condition? If so, where will it be fixed? Where does the figure 17-18¢ proposed by UGI and PSC come from? Finally, the Commission can well ask, how are we ever to catch up with the staggering load of § 4 and § 5 proceedings if to that burden we must now add two others—a full dress rehearsal hearing for every certification or the equivalent

of a § 4 suspension proceeding through the guise of a price condition?[9]

I am confident of only one thing: this case will be back several years and thousands of pages later. No one will know more than is known now.

I therefore respectfully dissent.

A true copy.

Test:

EDWARD W. WADSWORTH
Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit, New Orleans,
Louisiana

(Seal)

May 31, 1961

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[9] To be effective as a protection for the consumer and at the same time assure ultimate collection by the seller of a "just and reasonable" rate from the time of commencement of the service by the conditional certificate would probably take the form of a specified price with a right to file for an immediate increase with or without the five-months' suspension under § 4. This would then take its place with all of the other § 4 proceedings. During fiscal 1959 the Commission suspended 1,091 rates. At that year end rate filings suspended totaled 2,323. FPC, *Thirty-Ninth Annual Report*, p. 82 (1959). The FPC's brief tells us that the revenue increments representing the difference between the contingent rates and prior rates exceeded $110 millions in fiscal 1959. Forty percent of gross revenues collected are under § 4 suspensions.

Judgment

Extract from the Minutes of February 22, 1961.

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

This cause came on to be heard on the petition of the United Gas Improvement Company, for review of an order of the Federal Power Commission issued on August 10, 1959 in Docket Nos. G-15,122 and G-15,123, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside; and that this cause be, and it is hereby, remanded for further appropriate action by the Commission.

"Brown, Circuit Judge, Dissenting."

Filed 6th day of April, 1961.

CLARA R. JAMES
Dy Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,112

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

Petitions for Rehearing

(April 6, 1961.)

Before TUTTLE, *Chief Judge*, BROWN and WISDOM, *Circuit Judges*.

PER CURIAM:

It is ordered that the petitions for rehearing filed in the above styled and numbered causes be, and the same are, hereby DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18113

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,

versus

FEDERAL POWER COMMISSION, *Respondent*.

Petition for Review of an Order of the Federal Power Commission

(February 22, 1961.)

Before TUTTLE, *Chief Judge*, and BROWN and WISDOM, *Circuit Judges*.

TUTTLE, Chief Judge: The issue here presented is identical with that decided this same date in *United Gas Improvement Co.* v. *F. P. C.*, No. 18,112, in this Court. We conclude that for the reasons set out in that case the Commission erred in issuing an unconditional permanent certificate to the Superior Oil Company and Transcontinental Gas Pipe Line Company in the consolidated proceedings with an initial price of 21.4 cents per Mcf plus 75% of any new taxes to be levied (no state taxes are applicable because this is a supply of off-shore gas beyond the state boundaries). The record does not disclose that the Commission gave "most careful scrutiny" and responded with "most responsible reaction" to the initial price proposals required by the Supreme Court in *Atlantic Refining Co.* v. *Public Service Com. of New York*, 360 U.S. 378, 391 (popularly known as the CATCO case).

As we have pointed out in the companion case No. 18,112, the record makes it clear that the finding of public necessity and convenience here is based too strongly on the fact that arm's length dealing and the effect of supply and demand

required Transco to agree to the disputed price, rather than that the price had any relation to what might ultimately be found to be a just and reasonable price.

The certificating of a price that, as the Commission here agrees would probably be collected for several years without possibility of refund of any excess sums, does not, we think, comport with the teaching of the Supreme Court in the Atlantic Refining Company case. See also *United Gas Improvement Co.* v. *F. P. C.*, 9 Cir., ... F. 2d ...., decided October 31, 1960, and *Public Service Com. of New York* v. *F. P. C.*, D.C. Cir., ...F. 2d ....., decided December 8, 1960.

The order of the Commission is VACATED and the proceedings REMANDED for further appropriate action.

BROWN, Circuit Judge: I dissent.

APPENDIX B

Excerpts from the Natural Gas Act

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

* * * * * * * * * *

(c) [2] No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judg-

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[2] Subsection 7 (c) amended; (d), (e), (f) and (g) added February 7, 1942 by Public Law No. 144, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, 84.

ment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f (c)][3]

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[3] As originally enacted June 21, 1938 by Public Law No. 688, 75th Congress, Chapter 556, 3d Session [H. R. 6586], 52 Stat. 825, Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however*, That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall

(e)[5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f (e)]

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REHEARING; COURT REVIEW OF ORDERS

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give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

Public Law No. 444, 77th Congress, Chapter 49, 2d Session [H. R. 5249], 56 Stat. 83, which amended Section 7 (e), effective February 7, 1942, was enacted after the Commission's decision *In the Matter of Kansas Pipe Line & Gas Company*, 2 F. P. C. 29.

[5] See footnote 2, p. 7.

(b) [9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for

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[9] The Act of August 28, 1958 (72 Stat. 941 at 947) added the last sentence to subsection (a) and, in the second sentence of subsection (b), substituted "Transmitted by the clerk of the court to" for "served upon", substituted "file with the court" for "certify and file with the court a transcript of" inserted "as provided in section 2112 of title 28, United States Code", and, in the third sentence, substituted "jurisdiction, which upon the filing of the record with it shall be exclusive" for "exclusive jurisdiction".

[10] Circuit Court of Appeals of the United States was redesignated as "United States Court of Appeals" by Act of June 25, 1948, 62 Stat. 870.

leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 149

SUN OIL COMPANY, *Petitioner*

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT THE UNITED GAS IMPROVEMENT COMPANY IN OPPOSITION

J. DAVID MANN, JR.
WILLIAM W. ROSS
JOHN E. HOLTZINGER, JR.
WILLIAM E. ZEITER
1120 Connecticut Ave., N. W.
Washington 6, D. C.
Attorneys for The United Gas Improvement Company

MORGAN, LEWIS & BOCKIUS
Philadelphia — Washington
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 149

SUN OIL COMPANY, *Petitioner*

v.

THE UNITED GAS IMPROVEMENT COMPANY and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT THE UNITED GAS IMPROVEMENT COMPANY IN OPPOSITION

OPINIONS BELOW

The order of the Federal Power Commisison (R. 252-56)[1] is reported at 22 FPC 351; the order denying rehearing (R. 287-88) is reported at 22 FPC 654. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-29a) is not yet reported.

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[1] References are to the boldface certified record numbers contained in the Joint Appendix.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 22, 1961 (Pet. App. 30a). A petition for rehearing was denied on April 6, 1961 (Pet. App. 31a). The petition for a writ of certiorari was filed on June 14, 1961. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r (b).

QUESTION PRESENTED

Was the court below correct in concluding (as have three other Courts of Appeals) that the Federal Power Commission, consistent with its obligation to protect gas consumers under the Natural Gas Act as interpreted in this Court's *CATCO* decision,[2] could not finally certificate gas producer sales at a price representing a sharp increase over pre-CATCO contract prices in the same area, where the only support offered for the challenged price was the existence of other pre-*CATCO* decision prices in the area certificated by the Commission prior to *CATCO* on equally defective records and under an erroneous view of law?

STATEMENT

Sun Oil Company (Petitioner) seeks from the Federal Power Commission an unconditional certificate of public convenience and necessity authorizing the sale in interstate commerce of natural gas from the Belle Isle Field, St. Mary Parish, Louisiana. The proposed initial price for the purchase of Sun's gas was 23.8 cents per Mcf, including 2.3 cents for reimbursement of Louisiana severance taxes. This price

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[2] *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U.S. 378 (1959).

was the *highest* that the purchaser, United Gas Pipe Line Company (the nation's largest interstate pipeline) had ever paid for *any* gas purchased *anywhere*.[3] (R. 25).

The hearings before a Commission examiner occupied a single day, January 27, 1959, during a period when Commission precedents provided (1) that natural gas producers could justify an initial price in a certificate case merely by showing a market for the gas at the proposed price,[4] and (2) that proponents of a price condition not only had the burden of showing that the contract price was not justified but also had the burden of establishing the reasonableness of a proposed alternative price.[5] Hence, Petitioner did not produce evidence bearing on the certification of a price which amounted to a new high, apart from some evidence of other unregulated sales at lower levels.

On August 7 and 10, 1959 the Commission issued six decisions of which the order under review was one, purporting to apply this Court's *CATCO* decision and unconditionally certificating South Louisiana sales in the 21-24 cent initial price range on substantially similar pre-*CATCO* records.

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[3] United later agreed to pay The California Company and The Superior Oil Company this same 23.8 cent price. As indicated in note 7, *infra*, this Court has already declined to disturb the Ninth Circuit's reversal of the Commission's unconditional certification of such later sales.

[4] I.e., merely by submitting a bona fide sale contract with a non-affiliated pipeline company. See, e.g., *Hope Natural Gas Company*, 19 FPC 405 (1958).

[5] See e.g., *Seaboard Oil Company*, 19 FPC 416, 420, 423 (1958) (Opinion No. 309).

Respondents The United Gas Improvement Company (UGI) and the Public Service Commission of the State of New York sought review of five of these decisions, including the instant one,[6] and the court below, as well as the Courts of Appeals of the Ninth, Tenth and District of Columbia Circuits, reversed.[7]

ARGUMENT

The record in this case is in all substantive respects identical to the records in the other four companion cases in which review of the Federal Power Commis-

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[6] The sixth order, in *South Georgia Natural Gas Co.*, 22 FPC 211, became final since neither UGI nor the New York Commission was eligible in the Federal Power Commission's view (see *Trunkline Gas Co.*, 22 FPC 110) to participate in that proceeding.

[7] The New York Commission sought review of the order in *Texas Gas Transmission Corp., et al.*, 22 FPC 378, rev'd, *Public Service Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), cert. denied, sub nom. *Hope Natural Gas Co.* v. *Public Service Comm'n*, 365 U.S. 880 (No. 793, Oct. Term 1960) and *Shell Oil Co.* v. *Public Service Comm'n*, 365 U.S. 882 (No. 774, Oct. Term 1960) (1961). Respondent UGI sought review of the other four: *The California Co., et al.*, 22 FPC 252, rev'd, *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), cert. denied, sub nom. *Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 (No. 780, Oct. Term 1960) and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881 (No. 776, Oct. Term 1960) (1961); *Sunray Mid-Continent Oil Co.*, 22 FPC 361, rev'd, *United Gas Improvement Co.* v. *FPC*, 287 F. 2d 159 (10th Cir. 1961); *The Superior Oil Co.*, 22 FPC 369, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 18, 113, CA 5 (February 22, 1961), cert denied, sub nom. *Superior Oil Co.* v. *United Gas Improvement Co.*, —— U.S. —— (No. 1005, Oct. Term 1960); and the instant case, *Sun Oil Corp.*, 22 FPC 351, rev'd, *United Gas Improvement Co.* v. *FPC*, No. 18, 112, CA 5 (February 22, 1961).

sion's August 7 and 10, 1959, decisions was sought.[8] Accordingly, the petition for certiorari herein is in substance one for rehearing of this Court's orders of April 17 and June 19, 1961 in Nos. 774, 776, 780, 793 and 1005, October Term 1960, denying certiorari to review judgments of the Fifth, Ninth and District of Columbia Circuits in the first three of those companion cases to reach this Court.[9] The opinions of all four circuits were reproduced in the petition in No. 774 and the opinion below was again reproduced in No. 1005 (see pp. 3a-33a) and all of the contentions now advanced by Petitioner, including conflict of decision and legal error, were fully presented in one or more of the five petitions heretofore considered and denied by this Court those cases.

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[8] The dissenting judge below (who had been supplied with copies of the records in the Ninth, Tenth and District of Columbia Circuit cases) characterized the respective records as "substantially the same" (Pet. App. 12a).

[9] The time has expired for seeking certiorari in the Tenth Circuit case. Thus the instant Petition brings the last of these cases before this Court.

CONCLUSION

For the foregoing reason it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

J. David Mann, Jr.
William W. Ross
John E. Holtzinger, Jr.
William E. Zeiter
1120 Connecticut Ave., N. W.
Washington 6, D. C.
Attorneys for The United Gas Improvement Company

Morgan, Lewis & Bockius
Philadelphia — Washington
Of Counsel

July 11, 1961

SUPREME COURT, U. S.

JUN 27 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] 149

SUN OIL COMPANY,

Petitioner.

v.

THE UNITED GAS IMPROVEMENT COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

KENT H. BROWN,
Counsel, Public Service Commission of the State of New York,
Office and Post Office Address:
55 Elk Street,
Albany 1, New York.

BARBARA M. SUCHOW,
Of Counsel.

346 Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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Statutes.

Natural Gas Act,

Section 7 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 1035.

SUN OIL COMPANY,

Petitioner,

v.

THE UNITED GAS IMPROVEMENT COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION.

Question Presented.

In the light of decisions by this Court in *Catco*[1] and *Transco-Seaboard*,[2] did the Court below err in setting aside an August 10, 1959 unconditional certificate of public convenience and necessity issued to petitioner by the Federal Power Commission under Section 7 of the Natural Gas

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[1] *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (June 22, 1959).

[2] *Public Service Commission* v. *Federal Power Commission*, 361 U. S. 195 (December 14, 1959).

Act, for sales from a southern Louisiana field at an initial price of 23.8¢ per Mcf, when

1. the record before the Commission did not contain the supporting evidence of price propriety which *Catco* requires for an unconditional certification at this price level, *and*

2. the Commission had not even instituted the proceedings, in compliance with this Court's *Catco* and *Transco-Seaboard* remand orders, wherein it was adjured to question the propriety of their price levels (21.4¢-23.55¢ per Mcf) and, in the absence of evidence to support them, to condition the certificates at a non-suspect, lower price line?

Statement of the Case.

The instant petition for a writ of certiorari is the sixth and, of necessity, the last in a series of related requests for review of five related decisions issued this term by four Courts of Appeal. Its predecessors and counterparts were Nos. 774, 776, 780 and 793, in which certiorari was denied by order of this Court dated April 17, 1961 and No. 1005, in which certiorari was denied by order dated June 19, 1961.[3]

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[3] The five cases are:

a. *Texas Gas Transmission Corp., et al.*, 22 F. P. C. 378, rev'd *Pub Serv. Comm.* v. *Fed. Power Comm.*, 287 F. 2d 146 (D. C. Cir. 1960), cert. den. *Hope Nat. Gas Co.* v. *Pub. Serv. Comm.*, 365 U. S. 880 (No. 793) and *Shell Oil Co.* v. *Pub. Serv. Comm.*, 365 U. S. 882 (No. 774) (1961).

b. *The California Co., et al.*, 22 F. P. C. 252, rev'd *U. G. I.* v. *F. P. C.*, 283 F. 2d 817 (9th Cir. 1960) cert. den. *Superior Oil Co.* v. *U. G. I.*, 365 U. S. 879 (No. 780) and *California Co.* v. *U. G. I.*, 365 U. S. 881 (No. 776) (1961).

c. *The Superior Oil Co.*, 22 F. P. C. 369, rev'd *U. G. I.* v. *F. P. C.*, 5th Cir. No. 18113 (February 22, 1961), No. 1005, cert. den. June 19, 1961.

The order of the FPC reversed by the Court of Appeals decision here the subject of an application for review, was issued on August 10, 1959, as were each of the orders involved in the above-numbered petitions. As in the other cases, the underlying FPC proceeding concerned applications for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. In this proceeding petitioner sought and obtained FPC authorization for a sale of natural gas in interstate commerce from southern Louisiana at an initial price of 23.8¢ per Mcf, the highest of the initial prices certificated by the Commission in its series of August 10 orders.

The hearing before the Commission on petitioner's application began and ended on January 27, 1959. The proceeding originally had been scheduled for earlier disposition under Section 1.32 of the Commission's Rules of Practice and Procedure providing for "shortened procedures" where "no issue of substance is raised." Intervenor protests, however, necessitated the later "full" hearing. The Presiding Examiner's intermediate decision was issued on March 3, 1959. Both the record of the hearing and the decision of the Examiner reflect adherence to and application of the then prevailing, pre-*Catco*, automatic-*prima-facie*-case-in-favor-of-any-initial-price-demanded FPC producer certificate philosophy.

On June 22, 1959, however, that philosophy, along with the 21¢-24¢ southern Louisiana initial price level it had engendered, were thoroughly dispelled by this Court's decision in the *Catco* case. But on August 4, 1959, the

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d. *Sunray Mid-Continent Oil Co.*, 22 F. P. C. 361, rev'd, *U. G. I.* v. *F. P. C.*, 287 F. 2d 159 (10th Cir., 1961).

e. *Sun Oil Corp.*, 22 F. P. C. 351, rev'd *U. G. I.* v. *F. P. C.*, 5th Cir., No. 18112 (February 22, 1961) (the instant case).

21¢-24¢ initial price line, if not the regulatory philosophy which had produced it, appeared to receive a renewed imprimatur of propriety as a result of the Third Circuit's affirmance of the Commission's *Transco-Seaboard* decision.[4]

With that inspiration, the Commission promptly (on August 10, 1959) released decisions in five of its pending southern Louisiana high producer initial price proceedings, including the instant one, in which hearings had been completed and intermediate decisions had been issued prior to June 22 (*Catco* Day). In each, the Commission affirmed the intermediate decision and certificated sales at initial price levels up to 23.8¢ per Mcf (in this case) upon records as deficient in justification for such prices as had been the Catco record for its initial prices of 22.4¢ per Mcf.

Each of the Commission's five August 10 certificate decisions was appealed by the Public Service Commission of the State of New York (intervenor-petitioner below) or by the United Gas Improvement Company. Each was reversed by the reviewing Court. Three of the five related Court of Appeals decisions have been the subjects of petitions for certiorari heretofore. Petitions in two were denied by the Court on April 17, 1961. The petition in the third was denied on June 19, 1961. Time for filing a petition has expired in the fourth. And the instant petition, in the fifth, represents the last in this series of endeavors by producers to persuade this Court to annul the producer regulatory principles set forth in its *Catco* decision of June 22, 1959, reemphasized in its *Transco Seaboard* decision of December 14, 1959 and reiterated, unanimously, by four United States Courts of Appeal in the decision below and others issued during 1960-61.

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[4] *United Gas Improvement Company* v. *Federal Power Commission*, 269 F. 2d 865.

Reason For Denying The Writ.

The facts in this case are virtually identical with those recently before the Court in *California Company* v. *U. G. I.* and *Superior Oil Company* v. *U. G. I.*, Nos. 776 and 780, this term.[5] The gas purchaser in each of the underlying FPC proceedings was the same interstate pipeline company; the area of the sale was the same; and the proposed initial price, 23.8¢ per Mcf, was the same. Indeed, the FPC order involved in the earlier case expressly recites that that proceeding was a "companion" to the one here in issue. See *The California Company, et al.*, Docket G-16108, *et al.*, 22 F. P. C. 252, at p. 253.

In addition, the record herein is substantially the same as those before the Court below and three other Courts of Appeal on review of the Commission's four companion decisions of August 10, 1959.

Finally, the reasons advanced in this petition for the granting of the writ are substantially the same as those advanced in the related petitions filed in Nos. 774, 776, 780, 793 and 1005.

The Public Service Commission respectfully submits that the decision below, on its face, is in accord with and furthers the objectives of this Court's decisions and orders of remand in the *Catco* and *Transco-Seaboard* cases. We believe further, that the contentions raised by the instant petition have been disposed of by the Court's orders of April 17, and June 19, 1961 denying analogous petitions

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[5] Ninth Circuit case; see footnote 3(b), *supra*.

for certiorari in related cases. Accordingly, we request that the petition be denied.

Respectfully submitted,

KENT H. BROWN,
Counsel, Public Service Commission of
the State of New York,
Office and Post Office Address:
55 Elk Street,
Albany 1, New York.

Date: June 24, 1961.

BARBARA M. SUCHOW,
Of Counsel.